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March 23, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 2, 2009

Case Number: TSO-0830

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the Individual) to retain his access authorization.^{1/} The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization.^{2/} After reviewing the evidence before me, I find that the Individual's suspended access authorization should not be restored.

I. Background

The Individual is employed by a Department of Energy (DOE) contractor. He was granted a security clearance in 1975 in connection with his employment. In March 2009, the Individual was arrested for Driving While Impaired (DWI). Because this arrest raised legitimate security concerns, the Individual was summoned for an interview with a

^{1/} Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

^{2/} Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5(a).

Personnel Security Specialist from the DOE's Local Security Office (LSO). After this Personnel Security Interview (PSI), the Individual was referred to a local psychiatrist for a DOE-sponsored evaluation. This evaluation took place on June 25, 2009. The psychiatrist (hereinafter referred to as "the DOE psychiatrist") submitted a written report to the local security office setting forth the results of that evaluation, finding the Individual met the criteria necessary under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV TR) for substance dependence. Therefore, he diagnosed the Individual as alcohol dependent.

After reviewing all of the information in the Individual's personnel security file, including the results of the interview and the revised psychiatric evaluation, the LSO determined that derogatory information existed that cast into doubt the Individual's continued eligibility for a security clearance. The manager of the local DOE office informed the Individual of this determination in a letter that set forth in detail the LSO's security concern and the reasons for that concern. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the Individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The Notification Letter included a statement of derogatory information that created a substantial doubt as to the Individual's eligibility to hold a clearance. This information pertains to the Individual's diagnosis as alcohol dependent by the DOE psychiatrist, his March 2009 DWI arrest, and his admission into an intensive outpatient treatment program for his alcohol use. Also included as derogatory information is the Individual's admission that he (1) experienced symptoms of alcohol withdrawal, (2) hid his alcohol use from his wife, (3) admitted his alcohol consumption contributed to the dissolution of his first marriage and caused concern for his second wife, and (4) admitted that he feels guilty about his alcohol consumption. Information of this type is defined as derogatory in paragraphs (h) and (j) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.^{3/}

Derogatory information was also included in the Notification Letter pertaining to the Individual's admission during his PSI that he used his wife's prescription medication on six occasions. Information of this type is defined as derogatory in paragraph (k) of the

^{3/} Criterion (h) refers to information indicating that an individual has "an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). Criterion (j) refers to information indicating that an individual has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." *Id.* at § 710.8(j).

criterion for eligibility for access to classified matter or special nuclear material.^{4/} This information is also defined as derogatory under paragraph (l) of the criterion for eligibility for access authorization.^{5/} Also raised as derogatory information under criterion (l) was the Individual's DWI and the fact that he signed DOE Security Acknowledgments in 2003 and 1999, certifying that he understood that the use of an illegal drug, *i.e.*, his wife's prescription medication, while holding a security clearance could result in the loss of his access authorization.

The Individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals (OHA), and I was appointed the Hearing Officer. The DOE entered 12 exhibits into the record and presented the testimony of the DOE psychiatrist. The Individual entered 17 exhibits into the record and presented the testimony of seven witnesses, in addition to testifying himself. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.

II. Regulatory Standard

A. The Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates that "security-clearance determinations should err, if they must, on the side of denials.") *Dorfman v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

^{4/} Criterion (k) pertains to information indicating that the Individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.) except as prescribed or administered by a physician" or otherwise authorized by federal law. 10 C.F.R. § 710.8(k).

^{5/} Under criterion (l), information is derogatory if it tends to show that the Individual is not honest, reliable, or trustworthy; or if it furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of national security. 10 C.F.R. § 710.8(l).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis of the Hearing Officer’s Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person’s access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites four criteria as the basis for suspending the Individual security clearance, Criteria H, J, K, and L. To support the criteria, the LSO relies on the DOE psychiatrist’s opinion, the Individual’s arrests for DWI, and the Individual’s admitted use of his wife’s prescription medication, along with the Individual’s various admissions regarding his alcohol use and its effects.

Specifically, the DOE psychiatrist opined that the Individual is alcohol dependent. As of the date of the examination, the DOE psychiatrist determined that the Individual was neither reformed or rehabilitated, but in early remission. The LSO was also concerned by the Individual’s DWI arrest of March 20, 2009, and his misuse of his wife’s prescription medication.

I find that the information set forth above constitutes derogatory information that raises questions about the Individual’s alcohol use under Criteria H and J. The security concerns associated with Criterion H are as follows: “Certain emotional, mental, and personality conditions can impair judgment, reliability or trustworthiness.” Guideline I of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House. (Adjudicative Guidelines). The security concerns associated with Criterion J are as follows: “Excessive alcohol consumption often leads to the exercise of questionable

judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness." Guideline G of the Adjudicative Guidelines.

Further, the information set forth above constitutes derogatory information that raises concerns about the Individual's drug use under Criterion K. The security concerns associated with Criterion K follows: "misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulation." Guideline H of the Adjudicative Guidelines. Finally, the information set forth above constitutes derogatory information that raises concerns about the Individual's personal conduct. The security concerns associated with Criterion L follows: "conduct involving questionable judgment, lack or candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Guideline E of the Adjudicative Guidelines.

IV. Findings of Fact

The Individual was arrested for DWI, Hit and Run, and Open Container on March 20, 2009. Ex. 1 at 2. He last consumed alcohol on March 22, 2009. The next morning, he reported the DWI to his supervisor. His supervisor told him to report to Occupational Health. The doctor at Occupational Health referred him to an intensive outpatient program (IOP). Ex. 5 at 2.

During an April 29, 2009, PSI, the Individual admitted that he had blacked out due to his alcohol consumption during the DWI incident. Ex. 12 at 11. He also admitted that he had experienced alcohol withdrawal symptoms during the previous few years. Ex. 12 at 87-88. He acknowledged that he hid his alcohol consumption from his wife prior to March 2009 and that he felt guilty about his alcohol consumption. Ex. 12 at 68-70. Finally, in regard to his alcohol consumption, the Individual admitted that it contributed to the dissolution of his first marriage and that his current wife expressed concern about his alcohol consumption. Ex. 12 at 50, 62, 77-76, 83-84, 92.

Also during the April 29, 2009, PSI, the Individual admitted that he used his wife's prescription medication, Adderall, illegally on at least six occasions. Adderall is prescribed to combat Attention Deficit Hyperactivity Disorder.^{6/} The Individual used the medication to stay alert during long drives. Ex. 5 at 8. He also used it to recover from his overindulgence in alcohol. Tr. at 155.

^{6/} <http://en.wikipedia.org/wiki/Adderall>

V. Analysis

I have thoroughly considered the record of this proceeding including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the Individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)^{2/} and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's access authorization should not be restored. I find that restoring the Individual's DOE security clearance will endanger the common defense and security and is clearly inconsistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Criteria H and J

There is no disagreement between the experts in this case that the Individual is alcohol dependent. His counselor, the Occupational Health doctor, and the DOE psychiatrist testified that he is alcohol dependent. Tr. at 10, 164, 176. He does not dispute the diagnosis. Tr. at 121. So the question before me is whether the Individual is rehabilitated or reformed.

Immediately after the March 2009 DWI, the Individual entered an IOP. He attended the IOP four mornings a week. Tr. at 128. On the other three days of the week, he was required to attend an Alcoholics Anonymous (AA) meeting. Tr. at 128. Since the IOP has ended, the Individual has been attending AA meetings regularly, along with once weekly aftercare meetings provided by the IOP. Tr. at 74, 90, 152. In addition, he has been attending counseling about his alcohol dependence and his marriage.

All the witnesses who testified regarding his involvement with AA agree that he has been following the program conscientiously. Tr. at 22, 78, 94, 169. His AA sponsor testified that the Individual is one of the attendees that "gets it," by which he meant that the Individual's participation in AA is genuine. Tr. at 73, 78. His counselor testified that she is impressed with his seriousness in his recovery. Tr. at 11. She testified that the Individual has a strong support system. Tr. at 20. He fully embraces AA as a part of his new life. Tr. at 22. She stated that as he has regularly been committed to fitness and exercise, "he sees AA as kind

^{2/} Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation, and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant material factors.

of his recovery gym that he goes to on a regular basis to keep spiritually fit.” Tr. at 22. The Occupational Health doctor testified that she agreed with the counselor that the Individual has a strong support system. Tr. at 168. She also testified that the Individual is in a great program with his counselor, his sponsor, AA, and his family. Tr. at 165. The aftercare facilitator from the IOP testified that the Individual is regular in his attendance at the aftercare meeting. Tr. at 90. If he is not going to be in attendance, he calls. Tr. at 93. The aftercare facilitator, who is also in recovery, agreed with the Individual’s sponsor that the Individual understands that he can never consume alcohol again. Tr. at 77-78.

Still, as of the date of the hearing, the Individual had only had about eight months of sobriety. All three experts testified that they believe he would need to be sober for one year before they would consider him reformed or rehabilitated. In addition, he had a previous period of eight months of sobriety. While I believe that the Individual is sincere and dedicated to his recovery, I cannot conclude that his security clearance should be restored at this time. He is well on the road to making a full recovery, but did not have enough time invested as of the date of the hearing.

B. Criteria K and L

The LSO also raised security concerns regarding the Individual’s misuse of his wife’s prescription medication and his DWI. He testified, as did his counselor, that his use of his wife’s prescription medication was to alleviate the affects of his overindulgence in alcohol. Tr. at. 46-47, 48. Further, his DWI was a direct result of his excessive alcohol consumption. I agree that both these concerns would be resolved with a finding that the Individual is rehabilitated or reformed from his diagnosis of alcohol dependence. As I indicated above, he is not yet at that point in his recovery. Therefore, I must correspondingly conclude he has not yet resolved the security concerns associated with his illicit drug use and unusual conduct.

V. Conclusion

As the foregoing indicates, the Individual has not resolved the security concerns cited in the Notification Letter under Criteria H and J. Therefore, I conclude that the Individual has not shown that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual’s access authorization should not be restored at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: March 23, 2010